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TABLE OF AUTHORITIES

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JURISDICTIONAL STATEMENT

By Information filed in the Circuit Court of Cape Girardeau County, Missouri on October 5, 1992, Mr. Lyons was charged with three counts of murder in the first degree (T.L.F. 1, 15)[1]. After the first phase of trial, the jury returned verdicts of guilty of murder in the first degree on two counts, and guilty of involuntary manslaughter on the remaining count (T.L.F. 12). After the second phase of trial, upon one murder first degree count, the jury recommended death, upon another murder first degree count, the jury could not decide punishment, and upon the involuntary manslaughter count,

[1] **"T.L.F." refers to the Trial Legal File prepared for and tendered to this Court as part of the Record of Appeal upon the original consolidated appeal. R.L.F. refers to the Rule 29.15 Legal File tendered to this Court. "Tr." refers to the Trial transcript. All such items are still contained in this Court's files related to these matters. "L.F." refers to the Legal File prepared in this proceeding.**

the jury recommended a seven year sentence (T.L.F. 12). Mr. Lyons was then sentenced by the Trial Court to death upon each murder in the first degree count, and to seven years imprisonment upon the involuntary manslaughter count (T.L.F. 13). Upon direct appeal, addressing the issues then raised, this Court affirmed the convictions and sentences. ***State v. Lyons***, 951 S.W.2d 584, 587 (Mo.banc 1997).

Thereafter, Mr. Lyons' original Rule 29.15 Petition was prepared by counsel, and filed on Mr. Lyons' behalf (R.L.F. 1, 5). Counsel then filed Mr. Lyons' Amended Petition (R.L.F. 1, 16). Upon the grounds then raised, the 29.15 motion was overruled (R.L.F. 143). This Court affirmed that judgment. ***Lyons v. State***, 39 S.W.3d 32 (Mo.banc 2001).

On March 15, 2003, petition was brought in the Motion Court requesting that that Court reopen Rule 29.15 proceedings in light of Mr. Lyons' abandonment by post-conviction counsel and in light of Mr. Lyons' mental incompetence at the time of the Rule 29.15 proceedings (L.F. 1-45). On March 21, 2003, the Motion

Court overruled the request (L.F. 46).

This appeal challenges the ruling of the Circuit Court, involves the construction of a Rule of this Court, to wit Rule 29.15, and involves death sentence. This Court has jurisdiction pursuant to Article V, Section 3 of the Constitution of the State of Missouri.

STATEMENT OF FACTS

Mr. Lyons was charged with three counts of murder in the first degree (T.L.F. 1, 15). The State gave notice of its intent to seek the death penalty (L.F. 19). Shortly thereafter, Mr. Lyons attempted suicide and as a consequence was ordered to undergo a mental evaluation. State doctors concluded that Mr. Lyons suffered from a severe mental disease of lifelong duration, and that as a result, Mr. Lyons was not competent to proceed to trial (T.L.F. 353-362). Mr. Lyons was adjudged not competent to proceed to trial, and was placed at the Fulton State Hospital for care, custody and treatment for so long as his unfitness endured (T.L.F. 2-3).

On February 23, 1995, a hearing was conducted

regarding Mr. Lyons' competence to stand trial (T.L.F. 7). At that hearing, evidence was adduced from two psychologists, Dr. William Holcomb, Ph.D. for the State (2/23/95 Tr.[2] 2), and Dr. Phillip Johnson, Ph.D. for the defense (2/23/95 Tr. 40).

Dr. Johnson testified unequivocally that Mr. Lyons was not competent to proceed to trial because he was not capable of assisting his counsel (2/23/95 Tr. 67).

Though not a medical doctor, and not shown to be otherwise qualified through questioning regarding specialized credentials, Dr. Holcomb was permitted to testify concerning psychoactive medications being administered to Mr. Lyons, and the purported effect which those medications had on Mr. Lyons (2/23/95 Tr. 6, 21). Dr. Holcomb testified that Mr. Lyons was only "minimally" competent, and that even at that, it was questionable whether Mr. Lyons was "motivated" to assist with his defense (2/23/95 Tr. 27). Dr. Holcomb

[2]This pretrial motion hearing transcript is also contained in this Court's files.

testified that in order to maintain this minimal level of competence, Mr. Lyons would require medication and hospitalization through trial (2/23/95 Tr. 34-35). No medical doctor (psychiatrist) was ever called upon by the State to support this notion, advanced by Dr. Holcomb, regarding drug-induced minimal competence.

Upon this limited record, Mr. Lyons was found competent to proceed to trial (T.L.F. 7). No further hearings regarding competence were conducted prior to sentencing.

Dr. Bruce Harry, the Department of Mental Health psychiatrist who made the original finding of incompetence (T.L.F. 353), wrote a letter to Counsel for Mr. Lyons just prior to trial. In that letter, Dr. Harry warned that Mr. Lyons may well not be able to understand the proceedings against him, and may not be able to assist with his defense (L.F. 27).

At trial, Mr. Lyons was unable to assist his trial attorneys in preparing his defense (L.F. 30-31). Though the attorneys attempted to explain to Mr. Lyons the meaning of the proceedings, and matters related to trial strategy, Mr. Lyons did not appear to the attorneys to understand those explanations (L.F. 30). Mr. Lyons was very childlike in this state, able to understand only on

a very rudimentary level (L.F. 30). With Mr. Lyons in this state, defense attorneys could communicate with Lyons only on the most basic levels, could not explain the proceedings in a manner which Lyons could understand, and could not extract from Lyons any form of useful assistance in dealing with his case, save for basic investigation information (names of family members) (L.F. 30-31). In the opinion of his Trial Counsel, Mr. Lyons did not understand the trial proceedings against him, and was unable to assist with the defense offered at trial (L.F. 30-31).

At Mr. Lyons' trial, the jury returned verdicts of guilty of murder in the first degree on two counts, and guilty of involuntary manslaughter on the remaining count (T.L.F. 12). Upon one murder first degree count, the jury recommended death, upon another murder first degree count, the jury could not decide punishment, and upon the involuntary manslaughter count, the jury recommended a seven year sentence (T.L.F. 12). Throughout those proceedings, the Trial Court never once inquired about Mr. Lyons' understanding, or ability to assist.

Mr. Lyons was sentenced by the Trial Court to death upon each murder in the first degree count, and to seven years imprisonment upon the involuntary manslaughter count (T.L.F. 13).

At time of sentencing, the Trial Court inquired of Mr. Lyons about his understanding of the proceedings, and Mr. Lyons responded that there were a lot of things that he did not understand (Tr. 1043). The Trial Court did not inquire further about the cause and extent of Mr. Lyons misunderstanding (Tr. 1039-1043).

On direct appeal, Mr. Lyons was represented by D. Terrell Dempsey. ***State v. Lyons***, 951 S.W.2d 584, 587 (Mo.banc 1997). While Mr. Dempsey raised certain issues on behalf of Mr. Lyons, Mr. Dempsey did not raise the issue concerning Mr. Lyons being forced to trial when not competent. ***State v. Lyons***, supra. The issue regarding competence to stand trial was clearly and deliberately raised by trial counsel (L.F. 31), and was specifically raised in Mr. Lyons' Motion for New Trial (L.F. 325-327). The Trial Court itself acknowledged that the issue had been properly preserved for appeal (Tr. 1038).

Mr. Dempsey has admitted that his failure to raise this issue was an oversight on his part, and further has admitted that, had he properly identified the issue, he

would have raised the issue on appeal (L.F. 33-34).

Upon the issues raised by Mr. Dempsey, Mr. Lyons' convictions and sentences were affirmed. ***State v. Lyons***, supra.

Mr. Lyons' original Rule 29.15 Petition, and Amended Petition, were prepared by counsel, and filed on Mr. Lyons' behalf (R.L.F. 1, 5, 16). Appointed Counsel for Mr. Lyons was Peter Carter. Mr. Carter considered and raised issues challenging the assistance of Mr. Lyons' ***trial*** counsel.

However, at the time that Mr. Lyons' Rule 29.15 petition was brought, it was required, per the dictates of Rule 29.15(a), that all issues regarding ineffectiveness of counsel, including issues of ineffective appellate assistance, be brought in such a Rule 29.15 petition. Despite this clear requirement of the law, Mr. Carter never even considered raising ineffective appellate assistance claims on behalf of Mr. Lyons, and consequently did not raise any such issues (L.F. 36-37). Now that the matter has been squarely brought to Mr. Carter's attention, he indicates that he

believes to be meritorious an ineffective appellate assistance claim due to counsel's failure to raise upon direct appeal the issue of Mr. Lyons' incompetence to stand trial (L.F. 36-37). Mr. Carter admits that it was only by oversight that he did not raise this ineffective appellate assistance issue (L.F. 36-37).

Like trial counsel, Mr. Carter found Mr. Lyons to be incapable of understanding the proceedings, and incapable of assisting him with the proceedings (L.F. 44-45).

Upon the grounds raised by Mr. Carter, the 29.15 motion was overruled on December 30, 1999 (R.L.F. 143). Notice of Appeal from those rulings was filed on February 8, 2000 (R.L.F. 304). Thereafter, in an opinion issued January 31, 2001, the Missouri Supreme Court issued its opinion, affirming the denial of Rule 29.15 relief. ***Lyons v. State***, 39 S.W.3d 32 (Mo.banc 2001).

Dr. John Wisner, M.D., a psychiatrist and professor of psychiatry at the University of Kansas, has conducted an evaluation of Mr. Lyons, and has reviewed pertinent

records from the Fulton State Hospital, from the Potosi Correctional Center, and from the proceedings before the Trial Court (L.F. 39-42). Dr. Wisner has concluded, to a reasonable degree of medical certainty, that at the time of Mr. Lyons' trial, and ever since, Mr. Lyons has not been competent to understand the proceedings against him, or to assist with his defense (L.F. 40-41). Dr. Wisner has concluded that this incompetence is as a result of the mental disease or defect suffered by Mr. Lyons, exacerbated by the medication given to Mr. Lyons to control his behavior (L.F. 40-41). Dr. Wisner has further determined that the evidence is so compelling that any competent medical practitioner who would have been called to testify at the time of Mr. Lyons' trial would have had to have concluded as did he, that Mr. Lyons was not competent to stand trial (L.F. 41).

All of the aforementioned information was brought to the attention of the Motion Court in a Petition requesting that the Rule 29.15 proceedings be reopened in light of abandonment of post-conviction counsel and in light of Mr. Lyons' incompetence at the time of the

proceedings (L.F. 1-12). In the same pleading was also tendered a supplementary Rule 29.15 petition and suggestions in support thereof, as well as affidavits of critical witnesses, setting forth salient facts (L.F. 12-45). Without asking for a responsive pleading from the State, and without conducting a hearing of any kind, in a one page order, the Motion Court overruled the requests (L.F. 46). Mr. Lyons' Notice of Appeal to this Court was timely filed thereafter (L.F. 47).

POINT RELIED ON

The Motion Court clearly erred in overruling Mr. Lyons' request to reopen his Rule 29.15 proceedings because said action of the Court violated applicable provisions of Missouri law as interpreted by this Court, and further violated Mr. Lyons' rights to enjoy due process of law and effective assistance of counsel, and be free from cruel and unusual punishment, in derogation of the 6th, 8th and 14th Amendments to the Constitution of the United States and Article I, Sections 10, 18(a) and 21 of the Constitution of the State of Missouri in that

1. during Mr. Lyons trial, direct appeal, and Rule 29.15 proceedings, Mr. Lyons did not have the mental capability to understand the proceedings against him or to assist in his defense,
2. Mr. Lyons suffered prejudicial ineffective assistance of appellate counsel when his appointed appellate attorney failed to raise this compelling issue on direct appeal despite the fact that the issue was properly preserved,
3. Mr. Lyons was abandoned by appointed post-conviction

counsel in light of counsel's utter failure to even consider or raise issues of ineffective appellate assistance during Mr. Lyons Rule 29.15 proceedings.

Pate v. Robinson, 383 U.S. 375, 378 (1966)

Drope v. Missouri, 420 U.S. 162 (1975)

Strickland v. Washington, 466 U.S. 668 (1984)

State ex rel. Nixon v. Jaynes, 63 S.W.3d 210 (Mo.banc 2001)

ARGUMENT

A. Restatement of Point Relied On

The Motion Court clearly erred in overruling Mr. Lyons' request to reopen his Rule 29.15 proceedings because said action of the Court violated applicable provisions of Missouri law as interpreted by this Court, and further violated Mr. Lyons' rights to enjoy due process of law and effective assistance of counsel, and be free from cruel and unusual punishment, in derogation of the 6th, 8th and 14th Amendments to the Constitution of the United States and Article I, Sections 10, 18(a) and 21 of the Constitution of the State of Missouri in that

4. during Mr. Lyons trial, direct appeal, and Rule 29.15 proceedings, Mr. Lyons did not have the mental capability to understand the proceedings against him or to assist in his defense,

5. Mr. Lyons suffered prejudicial ineffective assistance of appellate counsel when his appointed appellate attorney failed to raise this compelling issue on direct appeal despite the fact that the issue was properly preserved,

6. Mr. Lyons was abandoned by appointed post-conviction counsel in light of counsel's utter failure to even consider or raise issues of ineffective appellate assistance during Mr. Lyons Rule 29.15 proceedings.

B. Standard of Review

The standard of review of a Rule 29.15 motion court's action is a determination of whether the findings and conclusions of the court are clearly erroneous. ***State v. Link*** 25 S.W.3d 136, 148-149 (Mo.banc 2000).

C. The facts in this case clearly demonstrate that Mr. Lyons has not been competent throughout State Court proceedings, that Mr. Lyons received ineffective appellate assistance, and that Mr. Lyons was abandoned by post-conviction counsel

1. Shortly after being charged in the underlying case,

Mr. Lyons was adjudged not competent to proceed to trial, and proceedings were suspended more than two years while Mr. Lyons was being treated in a mental hospital

By Information filed in the Circuit Court of Cape Girardeau County, Missouri on October 5, 1992, Mr. Lyons was charged with three counts of murder in the first degree (T.L.F. 1, 15). A day later, the State gave notice of its intent to seek the death penalty (L.F. 19).[3]

Shortly thereafter, Mr. Lyons attempted suicide and as a consequence was ordered to undergo a mental evaluation. State doctors concluded that Mr. Lyons suffered from a severe mental disease of lifelong duration, and that as a result, Mr. Lyons was not competent to proceed to trial (T.L.F. 353-362). Mr. Lyons was adjudged not competent to proceed to trial, and was placed at the Fulton State Hospital for care,

[3]Later in the proceedings, venue was changed to Scott County (L.F. 8).

custody and treatment for so long as his unfitness endured (T.L.F. 2-3). There Mr. Lyons remained for better than two years.

2. Mr. Lyons has an extensive history of mental illness, including other suicide attempts

As noted above, State doctors found that Mr. Lyons' mental illness is one of life-long duration (T.L.F. 353-362). Other anecdotal evidence from family members confirmed the extent and long duration of Mr. Lyons' mental problems (Tr. 923-977), including evidence regarding other suicide attempts by Mr. Lyons (Tr. 894-896, 927, 958-959).

3. Mr. Lyons was adjudged competent to proceed, despite a clear professional opinion to the contrary, based upon limited evidence from a witness not qualified to render the medical opinion which he did regarding competence induced by taking of psychoactive medication

On February 23, 1995, a hearing was conducted regarding Mr. Lyons' competence to stand trial (T.L.F. 7). At that hearing, evidence was adduced from two psychologists, Dr. William Holcomb, Ph.D. for the State

(2/23/95 Tr. 2), and Dr. Phillip Johnson, Ph.D. for the defense (2/23/95 Tr. 40). Both psychologists agreed that Mr. Lyons suffered from the chronic mental disease of delusional depression (2/23/95 Tr. 27, 48, 70), and suffered with hallucinations (2/23/95 Tr. 24, 60-61). Dr. Johnson testified unequivocally that Mr. Lyons was not competent to proceed to trial because he was not capable of assisting his counsel (2/23/95 Tr. 67).

Though not a medical doctor, and not qualified otherwise through questioning regarding specialized credentials, Psychologist Holcomb was permitted to testify concerning psychoactive medications being administered to Mr. Lyons, and the purported effect which those medications had on Mr. Lyons (2/23/95 Tr. 6, 21). Psychologist Holcomb testified that Mr. Lyons was only “minimally” competent, and that even at that, it was questionable whether Mr. Lyons was “motivated” to assist with his defense (2/23/95 Tr. 27). Psychologist Holcomb testified that in order to maintain this minimal level of competence, Mr. Lyons would require medication and hospitalization through trial (2/23/95 Tr. 34-35).

No medical doctor (psychiatrist) was ever called upon by the State to support this notion, advanced by Psychologist Holcomb, regarding drug-induced minimal competence.

Upon this limited record, Mr. Lyons was found competent to proceed to trial (T.L.F. 7). No further hearings regarding competence were conducted prior to sentencing.

4. The State psychiatrist who originally found Mr. Lyons not competent to proceed warned that, once trial began, Lyons would likely not be able to understand the proceedings

Dr. Bruce Harry, the Department of Mental Health psychiatrist who made the original finding of incompetence (T.L.F. 353), wrote a letter to Counsel for Mr. Lyons just prior to trial. In that letter, Dr. Harry warned that Mr. Lyons may well not be able to understand the proceedings against him, and may not be able to assist with his defense (L.F. 27-28).

5. According to trial counsel, Mr. Lyons was not competent to assist counsel at trial

As it turned out, Dr. Harry was right on. Mr. Lyons trial attorney, Beth Davis Kerry, indicated that Mr. Lyons was unable to assist in preparing his defense (L.F. 30-31). Though she and cocounsel attempted to explain to Mr. Lyons the meaning of the proceedings, and matters related to trial strategy, Mr. Lyons did not appear to the attorneys to understand those explanations (L.F. 30-31). Mr. Lyons was very childlike in this state, able to understand only on a very rudimentary level (L.F. 30-31). With Mr. Lyons in this state, defense attorneys could communicate with Lyons only on the most basic levels, could not explain the proceedings in a manner which Lyons could understand, and could not extract from Lyons any form of useful assistance in dealing with his case, save for basic investigation information (names of family members) (L.F. 30-31). In Ms. Davis Kerry's opinion, Mr. Lyons did not understand the trial proceedings against him, and was unable to assist with the defense offered at trial (L.F. 30-31).

6. The Trial Court did not inquire regarding Mr. Lyons' understanding of the proceedings until time of

sentencing, when Mr. Lyons explained that he did not understand the proceedings

Mr. Lyons' trial was had from April 22, 1996 through April 26, 1996 (T.L.F. 11-12). On April 25, 1996, the jury returned verdicts of guilty of murder in the first degree on two counts, and guilty of involuntary manslaughter on the remaining count (L.F. 12). On April 26, 1996, upon one murder first degree count, the jury recommended death, upon another murder first degree count, the jury could not decide punishment, and upon the involuntary manslaughter count, the jury recommended a seven year sentence (T.L.F. 12). Throughout those proceedings, the Trial Court never once inquired about Mr. Lyons' understanding, or ability to assist.

On June 27, 1996, Mr. Lyons was sentenced by the Trial Court to death upon each murder in the first degree count, and to seven years imprisonment upon the involuntary manslaughter count (T.L.F. 13).

At time of sentencing, the Court inquired of Mr. Lyons about his understanding of the proceedings, and Mr. Lyons responded that there were a lot of things that

he did not understand (Tr. 1043). The Court did not inquire further about the cause and extent of Mr. Lyons misunderstanding (Tr. 1039-1043).

7. Due to oversight, Appointed Appellate Counsel failed to raise the issue of Mr. Lyons' competence on appeal, though that issue had been properly preserved for appeal

On July 8, 1996, notice of appeal of these convictions and sentences was filed (T.L.F. 14). On direct appeal, Mr. Lyons was represented by D. Terrell Dempsey. ***State v. Lyons***, 951 S.W.2d 584, 587 (Mo.banc 1997).

While Mr. Dempsey raised certain issues on behalf of Mr. Lyons, Mr. Dempsey did not raise the issue concerning Mr. Lyons being forced to trial when not competent. ***State v. Lyons***, supra. The issue regarding competence to stand trial was clearly raised in Mr. Lyons' Motion for New Trial (T.L.F. 325-327). The Trial Court itself acknowledged that the issue had been properly preserved for appeal (Tr. 1038).

Mr. Dempsey has admitted that his failure to raise this issue was an oversight on his part, and has further

admitted that, had he properly identified the issue, he would have raised the issue on appeal (L.F. 33-34).

Upon the issues raised by Mr. Dempsey, Mr. Lyons' convictions and sentences were affirmed. ***State v. Lyons***, supra.

8. Appointed Post-Conviction Counsel admits that he abandoned Mr. Lyons by failing to even consider, much less raise, any issues related to ineffective assistance of appellate counsel

Mr. Lyons' original Rule 29.15 Petition was prepared by counsel, and filed on Mr. Lyons' behalf on December 26, 1997 (R.L.F. 1, 5). Counsel then filed Mr. Lyons' Amended Petition on March 30, 1998 (R.L.F. 1, 16).

At the time that Mr. Lyons' Rule 29.15 petition was brought, it was required, per the dictates of Rule 29.15(a), that all issues regarding ineffectiveness of counsel, including issues of ineffective appellate assistance, be brought in such a Rule 29.15 petition. While Appointed Counsel for Mr. Lyons, Peter Carter, considered and raised issues challenging the assistance of Mr. Lyons' trial counsel, Mr. Carter never even

considered raising ineffective appellate assistance claims on behalf of Mr. Lyons, and consequently did not raise any such issues (L.F. 36-37). Mr. Carter indicates that, now that the matter has been squarely brought to his attention, he believes to be meritorious an ineffective appellate assistance claim due to appellate counsel's failure to raise upon direct appeal the issue of Mr. Lyons' incompetence to stand trial (L.F. 36-37). Mr. Carter admits that it was only by oversight that he did not raise this ineffective appellate assistance issue (L.F. 36-37).

Upon the grounds raised by Mr. Carter, the 29.15 motion was overruled on December 30, 1999 (R.L.F. 143). Notice of Appeal from those rulings was filed on February 8, 2000 (L.F. 304). Thereafter, in an opinion issued January 31, 2001, the Missouri Supreme Court issued its opinion, affirming the denial of Rule 29.15 relief. ***Lyons v. State***, 39 S.W.3d 32 (Mo.banc 2001).

9. After thorough evaluation, a psychiatrist, Dr. John Wisner, M.D., has concluded that Mr. Lyons was not competent at the time of trial, and remains incompetent

to this date

Dr. John Wisner, M.D., a psychiatrist and professor of psychiatry at the University of Kansas, has conducted an evaluation of Mr. Lyons, and has reviewed pertinent records from the Fulton State Hospital, from the Potosi Correctional Center, and from the proceedings before the Trial Court (L.F. 39-42). Dr. Wisner has concluded, to a reasonable degree of medical certainty, that at the time of Mr. Lyons' trial, and ever since, Mr. Lyons has not been competent to understand the proceedings against him, or to assist with his defense (L.F. 40-41). Dr. Wisner has concluded that this incompetence is as a result of the mental disease or defect suffered by Mr. Lyons, exacerbated by the medication given to Mr. Lyons to control his behavior (L.F. 40-41). Dr. Wisner has further determined that the evidence is so compelling that any competent medical practitioner who would have been called to testify at the time of Mr. Lyons' trial would have had to have concluded as did he, that Mr. Lyons was not competent to stand trial (L.F. 41).

D. It was a gross constitutional violation for Mr. Lyons

to be put to trial and appeal, as he was, while not competent

1. Forcing to Trial One who is Mentally Incompetent Violates Substantive Statutory and Constitutional Rights

Conviction of an accused while he is legally incompetent violates the dictates of Section 552.020 RSMO and the 14th Amendment right to due process of law. ***Pate v. Robinson***, 383 U.S. 375, 378 (1966); ***Drope v. Missouri***, 420 U.S. 162, 171-172 (1975); ***Reynolds v. Norris***, 86 F.3d 796, 799-800 (8th Cir. 1996). In order to be competent to stand trial, the accused must have a present ability, at time of trial, to consult with his lawyer with a reasonable degree of rational understanding, and must have a rational and factual understanding of the proceedings against him. ***Drope v. Missouri***, 172; ***Dusky v. United States***, 362 U.S. 402 (1960); ***Reynolds v. Norris***, supra.

Placing on trial a person who is not competent amounts to plain error, resulting in manifest injustice or a miscarriage of justice. ***Pate v. Robinson***, 384; ***Cooper v. Oklahoma***, 517 U.S. 348, 354, fn. 4 (1996);

Reynolds v Norris, supra.

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so. An erroneous determination of competence threatens a fundamental component of our criminal justice system-the basic fairness of the trial itself. ***Reynolds v. Norris***, supra, quoting ***Cooper v. Oklahoma***, 353.

If a defendant challenges that this substantive right was abridged, he must be prepared to prove that it is more likely than not (i.e. by a preponderance of the evidence) that he was tried and convicted while mentally incompetent. ***Cooper v. Oklahoma***, 355-368.

2. There is a Concomitant Right to an Adequate Hearing to Determine Competence to Proceed to Trial

The substantive right to not be tried while

incompetent is safeguarded by a separate procedural right to a process through which the trial court can accurately determine the defendant's competence prior to trial. Section 552.020 RSMO; ***Drope v. Missouri***, 172-173; ***Reynolds v. Norris***, supra. This right is not properly safeguarded by a single, pretrial hearing, but rather necessitates the trial court's active vigilance, even *sua sponte*, throughout the proceedings. ***Drope v. Missouri***, 181; ***Reynolds v. Norris***, supra.

In order to establish denial of this procedural right, the defendant need only establish that, at the time of trial, a reasonable jurist could have a "bona fide doubt" about his competence. ***Pate v. Robinson***, 385; ***Reynolds v. Norris***, 800-801.

3. In assessing competence, courts must consider the totality of the circumstances, with special attention to particular matters

It is incumbent upon the trial court to weigh the totality of the circumstances in assessing competence, taking into account particularly

- any prior ***medical*** opinion as to the competence

of the defendant to stand trial;

- the defendant's prior history of mental problems;
- the opinion about the defendant's competence offered by his attorney;
- the defendant's actions or inactions while in Court at trial.

Drope v. Missouri, 180; ***Reynolds v. Norris***, supra; ***McGregor v. Gibson***, 248 F.3d 946, 954-955 (10th Cir. 2001).

4. The Available Evidence Demonstrates, not only that there was a Bona Fide Doubt about Mr. Lyons' competence, but also that Mr. Lyons was, more likely than not, Incompetent, and thus Mr. Lyons is entitled to have his convictions and sentences set aside

As already detailed above, nearly all of the evidence available to the Trial Court inexorably led to the conclusion that Andrew Lyons was not competent to stand trial.

- Mr. Lyons had a long history of mental illness, including suicide attempts (Tr. 894-896, 923-

977);

- Dr. Bruce Harry, M.D., the State's psychiatrist, authored the original report finding Mr. Lyons incompetent to proceed to trial due to effects from Mr. Lyons' life-long mental illness (T.L.F. 353-362);
- Dr. Harry's misgivings about Mr. Lyons competence remained so strong that he reiterated those misgivings to Counsel for Mr. Lyons on the eve of trial (L.F. 27-28);
- The Trial Court itself found Mr. Lyons incompetent, and left Mr. Lyons committed to the State Hospital for better than two years (T.L.F. 2-7);
- Defense Counsel believed Mr. Lyons incompetent based upon counsel's total inability to have communication with Mr. Lyons about any substantive legal issues, and upon Mr. Lyons' inability to provide any significantly useful information about his case (L.F. 30-31);
- When finally directly asked, at time of

sentencing, Mr. Lyons himself told the Court that he did not understand the proceedings against him (Tr. 1039-1043).

The lone claim of competence came from State psychologist, Dr. William Holcomb. But even Psychologist Holcomb's opinion came loaded with provisos:

- That Mr. Lyons suffered mental illness complete with delusions and hallucinations (2/23/95 Tr. 24, 27);
- That Mr. Lyons was "minimally" competent (2/23/95 Tr. 27);
- That Mr. Lyons' minimal competence could be had only with proper medication (2/23/95 Tr. 6, 21);
- That Mr. Lyons should be hospitalized pending trial (2/23/95 Tr. 33-35).

There were strong reasons to not accept Psychologist Holcomb's opinion when it was offered. First, Psychologist Holcomb's opinion relied at its bottom on his notion that medicines being used could render Mr. Lyons competent. The State never demonstrated that

Psychologist Holcomb was qualified to venture an opinion about whether the medical regime being used with Mr. Lyons was adequate to medically induce competence.[4]

[4]Of course, as it turns out, Dr. Wisner, a medical doctor, has determined that the particular medicines used with Mr. Lyons actually made Mr. Lyons' incompetence worse (L.F. 39-42). Certainly, the Trial Court could not have been aware of Dr. Wisner's opinion, coming as it has years after Mr. Lyons' trial. However, Dr. Wisner's opinion does highlight the obvious error, committed by the Trial Court, in accepting a medical

Second, Psychologist Holcomb's opinion ran contrary to opinions by the State's psychiatrist, Dr. Harry, expressed both before and after Holcomb's appearance before the Court (T.L.F. 353-362; L.F. 27-28). Third, Psychologist Holcomb's opinion ran contrary to the opinion of another psychologist, Dr. Phillip Johnson, that Mr. Lyons was not competent (2/23/95 Tr. 67).

But it was just that much more unreasonable for the Trial Court to continue to rely upon that lone opinion from Psychologist Holcomb, without more, when the case finally went to trial some fourteen months later (T.L.F. 14-15). After the February, 1995 hearing at which Holcomb testified, the Court never inquired on the matter again until time of sentencing, sixteen months later, at the end of June of 1996 (Tr. 1039-1043). And then, when Mr. Lyons said he did not understand the proceedings, the Court did not inquire further, and

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opinion from Psychologist Holcomb, one not qualified to give such an opinion.

merely acknowledged the position taken by the defense all along, that Mr. Lyons was not competent to proceed (Tr. 1038).

At the very least, all of this should have left with a reasonable jurist a bona fide doubt about Mr. Lyons' competence.

These facts, even standing alone, make it more likely than not that Mr. Lyons was not competent at the time of trial. But, when he takes on this higher burden to prove his incompetence by a preponderance of the evidence, Mr. Lyons does not have to settle for only those facts available at time of trial. He may, as he has, resort to any new evidence which can be garnered to establish that it was more likely than not that he was not competent at time of trial. ***Reynolds v. Norris***, 802-803; ***State v. Carroll***, 543 S.W.2d 48, 51 (Mo.App.Spg.Dist. 1976).

Since he could, Mr. Lyons has endeavored in advance to meet his burden of proof by calling on Dr. John Wisner, a medical doctor, a psychiatrist, a professor of psychiatry at the University of Kansas (L.F. 39-42).

Dr. Wisner has thoroughly evaluated the matters by pouring through the available written data, and by personally examining Mr. Lyons (L.F. 39-41). Dr. Wisner has concluded that Mr. Lyons was not competent at time of trial (L.F. 40-41). And, Dr. Wisner has taken things a step further. Dr. Wisner has concluded that no one trained in medicine could have concluded any differently (L.F. 41).

When Dr. Wisner's studied opinions are taken together with all of the other available information, it is indeed more likely than not that Mr. Lyons was not competent at time of trial. Thus, Mr. Lyons is entitled to have his convictions and sentences set aside accordingly. ***Cooper v. Oklahoma***, supra.

5. By Failing to Raise this Issue on Direct Appeal, Appellate Counsel Rendered Prejudicially Ineffective Assistance

In order to demonstrate that ineffective appellate assistance occurred, a defendant must establish that counsel's failure to raise an argument was objectively unreasonable, and that there is a reasonable probability that the result of the direct appeal would have been

different if the argument had been made. ***Strickland v. Washington***, 466 U.S. 668, 688, 694 (1984); ***Carter v. Bowersox***, 265 F.3d 705, 713-714 (8th Cir. 2001); ***Roe v. Delo***, 160 F.3d 416, 418 (8th Cir. 1998).

Failure to raise the issues here fits precisely the mold of ineffective appellate assistance. As noted already above, these issues were compelling, by law should have been decided differently by the Trial Court, and would have resulted in a different outcome had the issues been raised. ***Drope v. Missouri***, supra; ***Cooper v. Oklahoma***, supra. These issues were properly preserved, and readily ascertainable by competent counsel (Tr. 1038; T.L.F. 325-327).

While sometimes it can be argued that failure to raise an issue amounts a tactical decision by appellate counsel, such an argument cannot be made when counsel admits that the issue has merit, and that the failure to raise the issue was an oversight. ***Carter v. Bowersox***, 716; ***Roe v. Delo***, 419. Here, appellate counsel forthrightly and courageously admitted that he did not raise the issues because he overlooked them, that he had

no strategic reason for failing to raise the issues, and that he would have raised the issues had he identified them (L.F. 33-34).

E. Because Mr. Lyons was abandoned by post-conviction counsel regarding issues of ineffective appellate assistance, and because Mr. Lyons was not competent at the time of his post-conviction proceedings, the Motion Court's ruling was clearly erroneous, and Mr. Lyons must be permitted to raise issues of ineffective appellate assistance now

This Court's Rule 29.15 places strict time limits upon the bringing of post-conviction proceedings under its aegis. However, this Court has recognized an exception to those time limits when appointed counsel defaults in carrying out the obligations imposed upon him, and thereby abandons the Movant. ***Sanders v. State***, 807 S.W.2d 493, 494 (Mo.banc 1991); ***Luleff v. State***, 807 S.W.2d 495, 497 (Mo.banc 1991); ***State v. Bradley***, 811 S.W.2d 379, 384 (Mo.banc 1991).

When it came to issues of ineffective appellate assistance, Mr. Lyons was completely abandoned by his

Counsel.

As background for explaining this abandonment, it should be recalled that, for many years, issues of ineffective appellate assistance were addressed directly with the appellate Court via a Motion to Recall the Mandate. ***Reuscher v. State***, 887 S.W.2d 588, 591 (Mo.banc 1994). All of that changed when Rule 29.15(a) was amended to include the requirement that issues raised include claims of ineffective appellate assistance. Mr. Lyons' case was one of the first to which the new Rule 29.15 applied.

As noted already above, appointed post-conviction Counsel has candidly admitted that he completely abandoned Mr. Lyons when it came to issues regarding ineffective appellate assistance (L.F. 36-37). Because of that abandonment, Mr. Lyons should have been entitled to reopen his Rule 29.15 proceeding to now advance the issues regarding the failure of his appellate counsel to challenge Mr. Lyons's conviction and sentence based upon Mr. Lyons' lack of competence at time of trial; the Motion Court clearly erred in failing to so find. ***State***

ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 217-218 (Mo.banc 2001).

There is further reason for Mr. Lyons to be permitted to reopen his Rule 29.15 proceeding. That reason comes in light of the opinion rendered by Dr. Wisner (L.F. 39-42). At the time that Mr. Lyons 29.15 case was active before this Court, Mr. Lyons was not capable of understanding those proceedings, or assisting. Dr. Wisner's opinion in this regard is confirmed by Mr. Carter's experiences and observations (L.F. 44-45). Like trial counsel, Mr. Carter was unable to communicate with Mr. Lyons on any anything other that a very rudimentary level (L.F. 44-45). Such opinions by Counsel are to be given special credence since "[d]efense counsel is often in the best position to determine whether a defendant's competency is questionable." ***McGregor v. Gibson***, 248 F.3d 946, 960 (10th Cir. 2001).

When a person is incompetent, he is not capable to waive, and thus cannot be deemed to have waived, any rights he might have. `***Pate v. Robinson***, 383 U.S. 375,

384 (1966); ***Adams v. Wainwright***, 765 F.2d 1356, 1359 (11th Cir. 1985); ***Horace v. Wainwright***, 781 F.3d 1558, 1564 (11th Cir. 1986). Put another way, since Mr. Lyons was incompetent at the time of his appeal (L.F. 39-42), Mr. Lyons cannot be deemed to have acquiesced in his counsel's failure to raise upon appeal the issue of Lyons' lack of competence at the time of trial. And, since Mr. Lyons was incompetent at the time that Rule 29.15 proceedings were open before the Motion Court (L.F. 39-45), Mr. Lyons cannot be deemed to have acquiesced in his counsel's failure to raise the issue of appellate counsel's ineffectiveness.

Thus, because Mr. Lyons was abandoned by post-conviction counsel, and because Mr. Lyons was not competent to waive his rights to a full hearing of all issues before this Court, the Motion Court clearly erred in failing to permit Mr. Lyons to reopen his Rule 29.15 proceeding, to permit advancement of the issues of ineffectiveness of appellate counsel, and Mr. Lyons' incompetence at time of trial.

CONCLUSION

WHEREFORE, in light of the foregoing, Mr. Lyons prays that this Honorable Court reverse the judgment of the Motion Court, and remand the matter with directions that the Motion Court reopen his Rule 29.15 proceedings to raise the issues described in his proposed amended pleading (L.F. 12-45). Mr. Lyons additionally prays for any other and further relief which the Court may deem just and proper under the circumstances.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I do hereby certify that the foregoing has been prepared in WordPerfect 9 format, which reports a content of 6,537 words. A diskette containing this brief has been provided, and has been scanned for viruses with none having been detected.

FREDERICK A. DUCHARDT, JR.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing was mailed this 20th day of October, 2003 to the following

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